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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 14

MAE WHEELER, *et al.*,

Appellants,

—v.—

JOHN MONTGOMERY, Director of the State Department of Social Welfare, and RONALD BORN, General Manager of the San Francisco City and County Department of Social Services,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF *AMICI CURIAE* OF THE COLUMBIA CENTER ON SOCIAL WELFARE POLICY AND LAW, ROGER BALDWIN FOUNDATION OF THE AMERICAN CIVIL LIBERTIES UNION, MOBILIZATION FOR YOUTH, WILLIAMSBURG NEIGHBORHOOD LEGAL SERVICES, MORRISANIA NEIGHBORHOOD LEGAL SERVICES, AND LEGAL AID SOCIETY OF NEW YORK

LEE A. ALBERT
PAUL DODYK
HENRY A. FREEDMAN
401 West 117 Street
New York, New York 10027

Attorneys for the Columbia Center on Social Welfare Policy and Law

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 634

MAE WHEELER, *et al.*,

Appellants,

—v.—

JOHN MONTGOMERY, Director of the State Department of Social Welfare, and RONALD BORN, General Manager of the San Francisco City and County Department of Social Services,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF *AMICI CURIAE* OF THE COLUMBIA CENTER ON SOCIAL WELFARE POLICY AND LAW, ROGER BALDWIN FOUNDATION OF THE AMERICAN CIVIL LIBERTIES UNION, MOBILIZATION FOR YOUTH, WILLIAMSBURG NEIGHBORHOOD LEGAL SERVICES, MORRISANIA NEIGHBORHOOD LEGAL SERVICES, AND LEGAL AID SOCIETY OF NEW YORK

Interest of *Amici Curiae*

The Center on Social Welfare Policy and Law is the welfare law resource of the Legal Services Program of the Office of Economic Opportunity. Affiliated with the schools of law and social work at Columbia University, the Center undertakes research pertaining to the legal rights of wel-

fare beneficiaries and supports OEO-funded legal services programs and other legal organizations in the preparation of important litigation. The Center has submitted briefs to this Court in the cases concerning welfare residence requirements, substitute father rules, and eviction from public housing without a hearing.

The Center has rendered substantial assistance in cases around the country challenging the timeliness and adequacy of the procedures used for termination of the public assistance grant. It has coordinated the efforts of the groups described below in *Kelly* v. *Wyman*, which is the recently decided challenge to the hearing procedures for termination brought by twenty plaintiffs receiving public assistance in New York under the federally supported Aid to Families with Dependent Children (AFDC) and locally financed Home Relief programs. This Amicus brief in support of the Jurisdictional Statement in *Wheeler* v. *Montgomery* is prompted by the decision of the three-judge panel in New York, filed on November 26, 1968, submitted herein as Appendix A, which upholds the plaintiffs' claim under the Due Process Clause of the Fourteenth Amendment and is substantially at odds with the decision in *Wheeler*.

The Roger Baldwin Foundation of the American Civil Liberties Union is a non-profit organization devoted to the furtherance of civil liberties and civil rights in all aspects of American life. The transformation of constitutional guarantees of free speech, rational classification, and procedural due process into meaningful protection to needy persons dependent upon the State for their support has been a particular concern of the Foundation and led to its participation in the preparation of *Kelly* v. *Wyman*.

Mobilization for Youth, Williamsburg and Morrisania Neighborhood Legal Services, and the Legal Aid Society are supported by public funds (and, in the case of Legal Aid, private funds) and provide, together with other neighborhood legal services in New York City, virtually all of the legal representation to applicants for and recipients of public assistance.

Attorneys from the above organizations represent the plaintiffs in *Kelly* v. *Wyman,* which was an outgrowth of continuous efforts by attorneys for welfare recipients to deal with the numerous and daily instances of abrupt termination of benefits without notice of the reasons and without an opportunity to be heard. As the situations of the plaintiffs in *Kelly* depict, such attempts by counsel in *Kelly* to ascertain the reasons informally, to stave off evictions, to obtain emergency assistance, find housing and secure private charitable support to ameliorate the drastic consequences of erroneous termination were too often without avail. The extensive experience of these organizations was pooled with data collected by the Columbia Center on the extent and effects of wrongful termination to afford the court in *Kelly* a full and convincing record for resolution of the constitutional question.

Based on this record, the statutory three-judge panel in New York, Judges Feinberg, Bryan and McLean, unanimously ruled that the New York prior review mechanism, adopted after suit was brought, denied welfare recipients due process of law and enjoined termination of benefits without a prior hearing affording specified minimal requirements of due process. In an exhaustive opinion Judge Feinberg articulated for the court the factors bearing upon the constitutional requirement that a hearing before an

impartial official must be prior to termination and must afford disclosure of the evidence and its sources and opportunity to confront and cross-examine such sources. As the opinion in *Kelly* reflects, the record leaves no room for speculation about the crucial factors bearing upon this constitutional question, such as the vast area of discretionary judgments involved, the nature of the factual evidence relied upon, the impenetrable vagueness of the reasons told recipients, the timing of hearings held after termination, the percentage of reversals in such hearings, the impact of cut-off and delay, and so on.

Wheeler v. *Montgomery* and *Kelly* v. *Wyman* are the only two welfare prior hearing cases to have reached a decision before three-judge federal courts. This Court will readily appreciate that the parties in *Kelly* have a vital interest in the *Wheeler* case now on appeal before this Court. Accordingly, this brief is submitted to inform the Court of the recent decision in *Kelly* and the factors bearing upon that decision, factors not fully reflected in the cursory opinion in *Wheeler*. Moreover, the plaintiffs in *Kelly* receive benefits under the federally financed AFDC and locally funded Home Relief programs rather than federally financed Aid to the Aged; the termination issues in these programs may differ somewhat and the Home Relief program is not affected by the Social Security Act and HEW regulations thereunder.* Since this Court may in

* The Department of Health, Education and Welfare has proposed a regulation requiring continuation of assistance payments during the pendency of the statutory "fair hearing" in some, but not all, cases of termination under the federal categorical assistance programs. Said regulation is submitted herein as Appendix B. Requiring continuation only where the State or local welfare department decides initially that there is a genuine dispute of fact or judgment about an individual, the regulation is not coextensive with the decision in *Kelly*. Moreover, it has no bearing upon the Home Relief plaintiffs in *Kelly*.

its discretion be disposed to hear *Wheeler* v. *Montgomery* and *Kelly* v. *Wyman* on their merits together, as was done in the welfare residency cases, we also attempt in this brief to advise the Court of the proceedings in *Kelly*.*

I.

The questions are substantial and warrant plenary review in this Court.

This case represents another attempt to close the gap between the harsh actualities of welfare administration, isolated and insulated from the scrutiny of our legal system for decades, and abiding constitutional guarantees of fair and equal treatment. The issue is a narrow procedural one: whether due process of law mandates that a State afford individuals and families found after full investigation to be without resources, needy and eligible, a timely and adequate opportunity to be heard before an abrupt determination of ineligibility and withdrawal of the regular recurring subsistence grant for food, shelter and clothing.**

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* We are advised by counsel for Appellants in *Wheeler* that they would have no objections to having these cases argued together. We are informed that New York is pursuing an appeal in *Kelly* and we are prepared to adhere to any expedited schedule this Court deems appropriate.

** We do not deal here though with the substance of who is entitled to receive public assistance or to what extent. Cf. *King* v. *Smith*, 392 U. S. 309 (1968); *Thompson* v. *Shapiro*, 270 F. Supp. 331 (D. Conn. 1967), argued, 36 U. S. L. W. 3425 (U. S. May 7, 1968), reargued, 37 U. S. L. W. 3157 (U. S. Oct. 29, 1968) (No. 9, 1968 Term). Note, however, that the prior hearing issue was discussed in Appellee's Brief in *King* v. *Smith* (October Term, No. 949) at pp. 47-53.

This Court is called upon to rule not only on the timeliness of a termination hearing but also on the specific procedural safeguards constitutionally required in such proceedings. Although prior decisions of this Court provide persuasive support to the contentions of the plaintiff below (see Points II and III *infra*), we recognize that "[D]ue process is not a term of fixed and invariable content," *F. C. C.* v. *W. J. R.*, 337 U. S. 265, 275 (1949) and that this Court has not previously ruled on the precise questions involved in the context of welfare administration.

For obvious reasons this case is of the utmost importance to persons and families dependent on a public assistance grant for the basic necessities of life.* Its appropriate resolution calls for fulsome consideration of the factors bearing upon the requirements of procedural due process in the welfare context, such as the shattering impact of sudden and prolonged withdrawal of these subsistence benefits on adults, children and families, the kind of judgmental and controvertible findings on which caseworker decisions to cut off benefits so typically rest, and the actual timing of subsequent review. Because they define the need for and contours of due process in termination proceedings, we submit that these factors are deserving of careful examination and consideration in this Court.

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* In March 1968 some 4,180,000 adults and 4,209,000 children received categorical assistance. Another 749,000 persons received general assistance. California and New York have respectively the largest programs of Aid to the Aged and of AFDC and general assistance. *Welfare in Review*, U. S. Department of Health, Education and Welfare, September-October 1968, pp. 37, 38, 41, 43.

II.

Due process safeguards prior to the termination of benefits are a constitutional necessity in the context of welfare administration.

The federal and locally financed welfare programs are residual programs; under them the basic necessities—food, shelter, clothing—are furnished, most sparingly, to only the most impoverished individuals and families. Unlike benefit programs with waiting lists and a defined number of units, however, such as public housing, these are programs of unqualified statutory entitlements; all who meet the statutory conditions of eligibility are entitled to the grant.* The principal, though not the only, criterion of these programs is that of need, which must be acute; it, along with the other factors of eligibility, is initially established only after considerable investigation and verification.** Recipients are, as a condition of eligibility, denuded of all savings and valuable resources, save those essential for daily living, and reliance on the recurring grant, which itself borders at or below the subsistence level, is both compelled and absolute:

> "Suffice it to say that to cut off a welfare recipient in the face of this kind of 'brutal need' without a prior hearing of some sort is unconscionable . . . ." *Kelly*, p. 12.

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* *King* v. *Smith*, *supra*, at p. 317.

** The thoroughness of this procedure, the substantial burdens imposed on applicants, the indignities, delays, and frequent errors are described at length in *Eligibility Determination in Public Assistance*, 115 U. Pa. L. Rev. 1307 (1967).

The failure of the welfare system to meet its obligation to render accurate or fair decisions on a change in individual or family eligibility before abruptly withdrawing the grant has led to untold irreparable suffering and deprivation. The "play and action of purely personal and arbitrary power," * as demonstrated by the material in the records and the plight of plaintiffs in *Wheeler* and *Kelly*, is a salient characteristic of welfare administration.** Judge Feinberg concluded:

> "Against the justified desire to protect public funds*** must be weighed the individual's overpowering need in this unique situation not to be wrongfully deprived of assistance, and the startling statistic that post-termination fair hearings apparently override prior decisions to terminate benefits in a substantial number of cases. The obvious fact is that there is no way truly to make whole a recipient like Mrs. Velez for the indignity of living with her sister and thirteen children in one apartment because of a wrongful termination. The equally obvious remedy is to take greater care to prevent such injustice before it occurs." *Kelly*, p. 14.

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* *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886).

** Reports submitted by New York to the Court showed reversals or equivalent decisions, months after withdrawal of funds, in 36% of the cases. *Kelly* v. *Wyman*, n. 17. Reversals in Texas averaged 51% from 1958 to 1966. Bell and Norvell, *Texas Welfare Appeals: The Hidden Right*, 46 Tex. L. Rev. 223, 224 (1967).

*** Mississippi and Michigan provide a State fair hearing prior to termination of benefits. Mississippi Department of Public Welfare Manual, Vol. III, Sec. F, p. 6102; *Moore* v. *Houston*, No. 104435 (Wayne Co., Mich., Circuit Court, Consent Judgment, Nov. 1, 1968).

The structure and operation of the welfare system maximizes the danger of erroneous and arbitrary administrative action. Public assistance is a highly complex administrative program, involving a federal statute and HEW regulations (some published in the Federal Register, others in the Handbook of Public Assistance Administration, and others in "State Letters"), state statutes, board rules, and state and local regulations. At the same time standards and procedures are frequently vague or in conflict on crucial questions affecting recipients, leaving the answers to individual caseworker discretion or interpretation.* The pervasive requirements in these programs for establishing and re-establishing need, detailed and severe income and resource restrictions, broad requirements of disclosure, and extensive behavioral and moral constraints, all open up an extremely broad range of inquiry and entail persistent investigation of recipients.** Recipients, often illiterate and inarticulate and generally without access to legal assistance,*** are persons involved in a very unequal relationship with a caseworker and agency possessing enormous discretionary power, ranging from authorization of

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* The confusion about the term "cohabit" in Alabama's substitute parent rule in the minds of various welfare officials in Alabama, described in *King* v. *Smith* at 392 U. S. 314, is unfortunately typical. See *Texas Welfare Appeals, supra,* and Alan Keith-Lucas, *Decisions About People in Need* (Chapel Hill, Univ. of N. Car. Press, 1959).

** Indeed California apparently requires its hard-pressed staff to re-determine eligibility "no less often than once a month with respect to over one and one-quarter million public assistance recipients" (Motion to Affirm, p. 5) although federal requirements call for re-determination once every 12 months for Aid to the Aged and every six months for AFDC.

*** Brian, *Welfare from Below: Recipients' Views of the Public Welfare System,* 54 Calif. L. Rev. 370 (1966).

special grants for clothing and special diets to termination of the entire regular grant.* Cooperation, information and response are often assumed as a matter of right by the caseworker, whose demands are backed up by the power to terminate. The welfare system must also acknowledge excessive caseload handled by an inadequate, overworked and insufficiently trained staff, as well as haphazard and spotty investigations. Couple with all of this local political pressures and a deep suspicion of welfare recipients,** and the dangers of "honest error or irritable misjudgment" (*Kelly*, p. 22) are indeed greater here than in most administrative programs.

It is precisely because of these dangers that the Constitution requires an adequate opportunity to be heard before a particular determination in respect to an individual is implemented:

> "Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." *Hannah* v. *Larche*, 363 U. S. 420, 442 (1960).

Due process hearing safeguards are particularly vital where the government acts, as in welfare terminations,

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* Moreover, a study of New York City recipients showed that over half felt "ashamed" to be on welfare and a third felt that their caseworkers did not want to be bothered by them. Lawrence Podell, *Families on Welfare in New York City, Report No. 5*, City University of New York, 1968, pp. 10-11.

** Such measures as the freeze on federal matching payments in the AFDC program, effective July 1, 1969, but underscore the need for effective procedural safeguards as States attempt to restrict the number of persons receiving public assistance.

upon judgments about the conduct, character, veracity or trustworthiness of the individual, *Willner* v. *Committee on Character and Fitness,* 373 U. S. 96 (1963); *Greene* v. *McElroy,* 360 U. S. 474 (1959); *Goldsmith* v. *U. S. Board of Tax Appeals,* 270 U. S. 117 (1926); *Armstrong* v. *Manzo,* 380 U. S 545, 552 (1965). As seen in the case of the plaintiff herein, and the record in *Kelly,* disputed terminations involve rather intricate questions about the resources of recipients and their relatives and friends, the nature of the relationship between recipients and other persons, the extent of "cooperation" with the agency, the whereabouts, health, conduct, present and past employment of children, husbands, putative fathers, and the recipient, the availability and appropriateness of the recipient for work, of employment, and of child day-care centers.*

The absence of timely procedural safeguards also poses serious dangers to other constitutionally protected free-

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*In comparing the AFDC and OASDI programs, the United States in its amicus brief filed in *Kelly* well depicted the problems:

> "There is a much greater likelihood of change in the amount of a recipient's payment under AFDC, than there is in OASDI, or even in the other public assistance categories . . . . If the recipient obtains temporary employment for a month, he will be eligible only for a reduced payment, or perhaps no payment at all; when the income ceases, the family will probably be eligible for the full amount previously paid. Support payments may be made by an absent father for a few months and then cease. The problem, therefore, of the proper procedures to be followed in AFDC is more difficult for both the recipient and for the State agency, than is the comparable situation in OASDI" (p. 17).

The United States explicitly declined to express a view on the constitutional issue and maintained that regardless of the decision in *Kelly*

> "it does not appear that the validity of the Federal policies [permitting but not requiring a hearing prior to termination] under either the Federal statute or the Constitution is in issue here" (Brief, p. 3).

doms.* Welfare administration entails many constitutionally dubious practices, such as frequent visits to, and inspections and searches of, the home, intrusive questioning, requests for answers to incriminating questions about paternity or cohabitation and the like.** These widespread practices have rarely been contested by welfare recipients, since objection is deemed non-cooperation warranting termination of the grant. Without some adequate opportunity to be heard before cut-off, Fourth, Fifth and Fourteenth Amendment rights are constitutional luxuries beyond the pocketbook of welfare recipients. As recipients organize and petition welfare departments for redress of grievances, First Amendment rights too call for the protection of adequate procedural safeguards.

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* Cf., *Thorpe* v. *Durham Housing Authority* (No. 20, argued October 22, 1968); *Holt* v. *Richmond Redevelopment and Housing Authority*, 266 F. Supp. 397 (E. D. Va. 1966) (barring eviction ostensibly for undisclosed resources but actually for tenant organizing). Though there are similarities, there are also differences in the factors bearing upon constitutional requirements of administrative hearings in public housing evictions and welfare terminations. The eligibility requirements for public assistance are greater in number and complexity, the grounds for termination of the welfare grant are correspondingly more numerous, and eligibility is the subject of more pervasive investigation. The decision to terminate is directly and abruptly implemented, without any judicial proceedings, and hence there is no analogy to the eviction proceeding in public housing. There are also differences in the impact of termination of a government benefit which covers not only housing, but also food, clothing, medicines and other essentials of life.

** See Reich, *Midnight Searches*, 72 Yale L. J. 1347 (1965); *Parrish* v. *Civil Service Commission*, 66 Cal. 2d 260, 425 P. 2d 223 (1967).

III.

Due Process requires, and California and New York fail to provide, an adequate hearing prior to termination of benefits with the minimal procedural safeguards of appraisal of the issues and sources of evidence, an opportunity to confront and question persons supplying such evidence, and a decision rendered solely on the open record by a relatively impartial official.

The constitutional objections to the California recipient-caseworker conference mechanism is that it plainly fails on its face to provide an adequate hearing, however informal, for resolution of the factual issues underlying termination. The State-approved "Notice of Action" form (Appendix C herein) referred to in the California regulation* specifically validates cryptic reasons such as "excess income" and "change in living arrangement."** The "meeting" afforded in the regulation contemplates neither the receipt of the actual evidence of ineligibility nor the opportunity to question the sources of such evidence. Rather the recipient may only meet with and put arguments to the person who made the initial decision being challenged.*** It is that person alone, the case or eligibility worker, who informs the recipient of the reasons for his decision and the evidence he deems appropriate to reveal. Thus, the recipient must, after one or two days notice, attempt to disprove such evidence first learned at

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* Jurisdictional Statement, Appendix F.

** Certainly in many, if not most, cases, the "additional information needed" space will be left blank.

*** The Notice states ("[The caseworker] will be available to discuss the above problem with you. . . .")

the meeting, without the opportunity to confront the source or to put questions to him. On this basis the recipient is expected to convince the caseworker or eligibility worker that his initial decision was incorrect. Such a procedure is plainly without any of the elemental safeguards of due process.

As the court in *Kelly* held, due process does not require a formal judicial trial on eligibility prior to termination, but rather a hearing meeting those "minimum procedural safeguards [required] in the context of the welfare system", p. 17, to wit:

(a) Notice of the true reasons for the termination, clearly stated:

> "[T]he very summary form of notice of proposed terminations makes an intelligent reply difficult. Not only are the reasons given often incomprehensively vague, but additional or wholly different reasons may in fact be behind the decision to terminate" (p. 21).*

(b) An opportunity to appear "in person" (p. 19), so that the nature of the charges and the evidence may be revealed, and to produce evidence in rebuttal (pp. 21-22).

(c) "Where termination of benefits 'depends upon information supplied by a particular person whose reliability or veracity is brought into question by the applicant, confrontation and the right of cross-examination should be afforded' " (p. 23).

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* See Appendix D for a notice in New York, dated November 20, 1968, giving as the reason for proposed termination "failure to cooperate with Departmental policy," a classic and unfortunately typical "vague or cryptic charge" (p. 20).

(d) "[T]he decision of the reviewing official must be based solely on evidence before him which has been made available to the recipient . . ." (p. 26).

(e) A review officer "who has become too deeply involved in a case conscientiously to undertake an impartial review" will not conduct the hearing (n. 43). This refers to supervisors two ranks above the front-line caseworker approved as a review officer in *Wheeler*.*

There cannot be such disparate standards of due process for welfare recipients about to be deprived of vital grants; the sharply contrasting decisions of these two three-judge courts requires plenary consideration of this matter by this Court.

IV.

A trial-type hearing months after all aid has ceased cannot rectify the failure to provide a due process proceeding prior to termination of aid.

The court below considered California's pre-termination procedure constitutional "in light of" the provision for a trial-type hearing within two months after termination. This position cannot be sustained both because of the terrible injury inflicted during even a two month period and because, as the records in *Wheeler* and particularly *Kelly* amply demonstrate, hearings simply are not concluded in the time period upon which the court relied.

Responding directly to the *Wheeler* decision, Judge Feinburg stated:

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*See also *Wasson* v. *Trowbridge*, 382 F. 2d 807, 812 (2d Cir. 1967).

"While post-termination review is relevant, there is one overpowering fact which *controls* here. By hypothesis, a welfare recipient is destitute, without funds or assets." *Kelly*, p. 9 (emphasis supplied).*

Perhaps the decision of the court in *Wheeler* was colored by the fact that Mrs. Wheeler received a monthly Social Security check of $44.60 and had an adult son with assets; as the record in *Kelly* shows, such a situation is not typical.

The *Wheeler* decision assumes the rendering of post-termination hearing decisions within the 60-day federal limit. Handbook, Part IV, §6200(j). The States simply do not and will not render decisions within that time or anything approximating it, unless there is a systemic reason for expedition (such as the requirement that benefits be paid pending a decision).** Mrs. Wheeler waited over four months for the decision in the subsequent hearing. During the last several years, up to and through the 9 month period when *Kelly* v. *Wyman* was before the Court, New York averaged 90 to 150 days before a decision was forthcoming, with fewer than 10% of the termination decisions rendered in less than 60 days. Due process cannot be satisfied by proceedings so delayed.

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* The court went on to hold explicitly that "due process requires an adequate hearing before termination of welfare benefits, and the fact that there is a later constitutionally fair proceeding does not alter the result." *Kelly*, pp. 14-15.

** The utter inability of HEW to obtain compliance with its 60-day regulation is likely a factor behind the proposed regulation set forth in Appendix B. Indeed New York asserted in the *Kelly* proceedings that such delay keeps down the number of hearings and thereby saves money.

CONCLUSION

Defendants' motion to affirm should be denied.

Respectfully submitted,

LEE A. ALBERT
PAUL M. DODYK
HENRY A. FREEDMAN
401 West 117th Street
New York, New York 10027

Attorneys for the Columbia Center on Social Welfare Policy and Law

MARTIN GARBUS
156 Fifth Avenue
New York, New York 10010

Attorney for the Roger Baldwin Foundation of the American Civil Liberties Union

HAROLD J. ROTHWAX
DAVID DIAMOND
DAVID GILMAN
MARIANNE ROSENFIELD
PETER H. DARROW
320 East 3rd Street
New York, N. Y. 10009

Attorneys for Mobilization for Youth

RICHARD KWASNIK
1260 Boston Road
Bronx, New York 10456

Attorney for Morrisania Legal Services

LOUISE GRUNER GANS
260 Broadway
Brooklyn, New York

Attorney for Williamsburg Neighborhood Legal Services

SHYLEUR BARRACK
290 Lenox Avenue
New York, New York 10027

Attorney for the Legal Aid Society